No. 87-6431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WAYNE T. SCHMUCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF OF PETITIONER

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I. THE MAILING OF TITLE DOCUMENTS WAS COUNTERPRODUCTIVE TO PETITIONER'S SCHEME.

Petitioner was involved in an odometer tampering scheme whereby, as the government concedes, he deceived both used car dealers and used car purchasers about the actual mileage of the cars he sold. (See government's brief p. 2 *et. passim).* The only connection between petitioner's deceptive odometer tampering and the use of the United States Mails was that after petitioner sold each car, the used car dealer resold it to the purchaser, and the used car dealer mailed a title application on behalf of the purchaser to the State of Wisconsin Department of Motor Vehicles (See government's brief p. 2).

When the Wisconsin Department of Motor Vehicles received complaints about the cars that petitioner had sold, the government investigator turned to the title records that had been mailed to the DMV in order to trace the vehicle histories. (See government's brief p. 3.) The investigator obtained the addresses of the owners of the vehicles prior to petitioner, and obtained the odometer statements that the prior owners had prepared before petitioner had rolled back the odometers, (Joint App. p. 38). A simple comparison of the prior odometer statements with the odometer statements on the title applications that the used car dealers submitted showed that a roll back had occurred.

Without the title history that was mailed to the Department of Motor Vehicles, nothing could have been done about the consumer complaints that were received. Knowledge of the prior owners' addresses was preserved only in the title records.

At the risk of belaboring an obvious point, title registration laws are designed for the purpose of maintaining

records to enhance the ability of the government to prosecute crimes of the sort petitioner was engaged in. When Congress passed the Truth in Mileage Act, P.L. 99-579, (100 Stats. 3309), which raised the penalty for odometer tampering to a maximum of 3 years imprisonment and a maximum fine of $50,000,00, and which mandated disclosure and reporting of odometer mileage on titles, the debates and reports reflected a legislative intent to use title registration to detect and prosecute odometer fraud. See 131 Cong. Rec. S17654 - S17655; Sen. Danforth said the bill would close loopholes in the titling laws so consumers are better informed about true mileage, Sen. Gorton said the bill would make it easier to detect and prosecute odometer fraud, Sen. Exon said the bill would create a uniform "paper trail" of odometer readings to help trace and identify fraud, and Sen. Holling said the bill would reduce fraud by tighter control of registration and titling. See also 132 Cong. Rec. H9242 - H 9243; Mr. Rinaldo said the bill would aid law enforcement and prosecutors by creating a document trail, making odometer tampering more easily detected, and Mr. Bryant said that a major barrier to fighting odometer fraud was the lack of a paper trail. In addition, the Senate report on the bill, S.R. 99-47, describes the purpose of the law as to create a mechanism through which odometer tampering can be traced and prosecuted. 15 USC § 1981, the Congressional Findings and Declaration of Purpose for the odometer tampering statute, declares one of the purposes of the law to be establishing safeguards to protect purchasers from odometer tampering.

II. MAIL FRAUD CANNOT BE PREMISED ON COUNTERPRODUCTIVE MAILINGS.

The government's argument, by which these title records become the hook to hang a mail fraud conviction on,

is labored in the extreme. The government ignores the settled doctrine of this Court that the federal mail fraud statute does not reach all frauds, *Kann* v. *United States*, 323 U.S. 88 (1944), and that the showing, however convincing, that other crimes were committed does not establish mail fraud, *Parr* v. *United States*, 363 U.S. 370 (1960).

Supposedly, petitioner needed to have the titles to the cars he sold registered in order to continue selling cars. (See government's brief pp. 12-13). The government inadvertently concedes the pointlessness of that argument on page 12 of the government's brief, where they state:

"In order to complete the fraudulent transaction, petitioner had to ensure that the retail customers would purchase petitioner's cars *without realizing that the odometers on those cars had been tampered with* (emphasis added).[1]

The registration of title *in no way* depended upon the veracity of the odometer reading. The dealers and purchasers who bought the cars got valid titles. They did not rely on the fact that the title was good to reassure them that the odometer reading was true. They were not lulled into accepting petitioner's rolled back odometers by the fact that title registration occurred without problems. They registered the titles because the law requires title registration, and when they complained about the cars,

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[1] See also government's brief, pp. 17-18; "If the titles were not issued, the sales could not be made, and petitioner's continuing business with the dealers would rapidly come to a halt. By providing the means by which the victims could take legal custody of the cars, the issuance of titles made it possible for the petitioner's scheme to succeed, *with the victims none the wiser* (emphasis added).

the title records were the sole means of obtaining proof of petitioner's fraud.

The precedents upholding mail fraud convictions for odometer tampering are recent in origin. The seminal case, *United States* v. *Shryock*, 537 F.2d 207 (5th Cir.), *cert denied*, 429 U.S. 1100 (1976), is a two page opinion which deals with the "essential nature" of title registration to odometer tampering in one paragraph lacking relevant authority. *United States* v. *Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied* 456 U.S. 1006 (1982), relies on *Shryock*, and contains a strong dissent. *United States* v. *Fallon*, 776 F.2d 727 (7th Cir. 1985) and *United States* v. *Henson*, 848 F.2d 1374 (6th Cir. 1988) rely on *Galloway*. *United States* v. *Locklear*, 829 F.2d 1314 (4th Cir. 1987) cites no relevant authority.

The government repeatedly asserts that the victims of petitioner's scheme were the retail customers and not the used car dealers, (government brief pp. 8, 12, 17, 19). This is contrary to the indictment and proof.

In paragraph 9 of the indictment, it is charged that "the Wisconsin dealers and the Wisconsin customers would and did rely on the false odometer mileage reading . . . . and further that the Wisconsin dealers and Wisconsin customers would and did pay more for each automobile than would have been paid if the odometer mileage reading had not been altered," (Joint App. p. 5).

Even if the used car dealers suffered no direct economic harm because they resold the cars at inflated prices to their retail customers (see government's brief p. 12, footnote 6), their business reputations and good will suffered when their irate customers discovered that they had been sold "tainted goods."

In fact, petitioner's gain on any particular automobile would have been realized even if, while in the dealer's hands, the car was wrecked or stolen and never resold at all.

If the government's argument is accepted, it follows that since titling a car is essential to selling it, and selling a car is essential to profiting from rolling back the odometer, every time an odometer is rolled back, mail fraud is committed. Somewhere down the line of subsequent ownership, someone who relied on the false odometer reading is going to re-title the car by mail.

The government misreads the holdings in *Kann* v. *Untied States*, 323 U.S. 88 (1944), *Parr* v. *United States*, 363 U.S. 370 (1960) and *United States* v. *Maze*, 414 U.S. 395 (1974). The mailings in each of those cases occurred during the time period that the defendant's criminal activities were ongoing. The government's assertion that this Court found that the schemes had ended "at the time when the charged mailings occurred" is erroneous (government's brief p. 17). The reason that the mailings in *Kann*, *Parr*, and *Maze* did not support the mail fraud charges is that the mailings *contributed nothing to the success of the ongoing fraud*, and, in *Maze*, were *counterproductive*.

The government argues that counterproductive mailings, and routine, innocent mailings, are sufficient to support mail fraud, see government's brief pp. 8, 10, 14, 15.[2] In this case, the sole purpose of the mailings was to

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[2] E.g., "As a legal matter, the case would not stand differently even if the information in the title applications had led directly to petitioner's apprehension. The mail fraud statute does not suggest that a mailing is outside the statute simply because the mailing might aid investigators in uncovering or proving the existence of the scheme," government's brief p. 14.

preserve records for future use against petitioner. The government is seeking to overrule *Maze* with its argument.

Some of the cases the government cites in support of overruling *Maze*, *Kann* and *Parr*, i.e. *United States* v. *Green*, 786 F.2d 247 (7th Cir. 1986), *United States* v. *Mitchell*, 744 F.2d 701 (9th Cir. 1984), *United States* v. *Primrose*, 718 F.2d 1484 (10th Cir. 1983), *cert. denied*, 466 U.S. 974 (1984), and *United States* v. *Gorny*, 732 F.2d 597 (7th Cir. 1984) were prosecuted on the "clean and honest government" theory rejected by this Court in *McNally* v. *United States*, 483 U.S. ___, 97 L.Ed.2d, 292 (1987). In any event, the cases don't discuss the "counterproductive mailings" rule at all.

Of the other authorities cited by the government on this issue, in *United States* v. *Bernhardt*, 840 F.2d 1441 (9th Cir. 1988) the mailings contained checks which the defendant converted; in *United States* v. *Clark*, 649 F.2d 534 (7th Cir. 1981) dividend checks were mailed to the victim to lull her into accepting the legitimacy of defendant's phony investment scheme; in *United States* v. *Bright*, 588 F.2d 504 (5th Cir.), *cert denied*, 440 U.S. 972 (1979) a forged will was published by mailings; in *United States* v. *Dowling*, 739 F.2d 1445 (9th Cir. 1984), reversed on other grounds, 473 U.S. 207 (1985) defendant solicited orders, and filled them, through the mail; and in *United States* v. *Serino*, 835 F.2d 924 (1st Cir. 1987) defendant submitted inflated invoices as a part of a fire insurance fraud scheme.

Only in *United States* v. *Serino*, *supra*, is counterproductivity discussed. In that case, the phony invoices which the defendant submitted in support of his claim aroused the suspicions of the insurance company's

attorney, who nevertheless forwarded the invoices for consideration, along with a letter expressing the attorney's doubts.

In *Serino*, the purpose of the false invoices was to induce payment of the inflated claim. The suspicions aroused by the invoices did not negate their purpose, although the net effect was that the defendant's scheme was only an attempted fraud, not a completed fraud.

Serino recognizes the continued vitality of the rule that counterproductive mailings do not sustain mail fraud. The facts of each case must be analyzed independently to determine if the mailing in question furthered the scheme. Thus, the government's facile conclusion that the "routine" mailings in *Carpenter* v. *United States*, 484 U.S. ___, 98 L.Ed.29 275 (1987) and *United States* v. *Sampson*, 371 U.S. 75 (1962) support the convictions in the present case (government's brief p. 11) ignores the context of these cases. In *Carpenter* and *Sampson*, a specific reaction of third parties to the mailings was necessary or helpful to the fraudulent scheme. The mailings were more than "routine" for specific, articulable reasons.

In the present case, the government concedes that the title registration law hindered, rather than helped, petitioner (government brief pp. 14-15), but then argues inconsistently that the success of petitioner's scheme depended on compliance with the very law which tripped him up. In reality, few factual situations present more clearly counterproductive mailings than title registrations in odometer tampering cases.

III. THE FACTS OF THIS CASE REQUIRE A LESSER INCLUDED OFFENSE INSTRUCTION ON ODOMETER TAMPERING.

The government's argument in support of the "statutory elements" test for lesser included offenses begins

with a misconstruction of the facts of this case. The government adopts the erroneous statement of the *en banc* opinion that the indictment did not charge the essential elements of odometer tampering (see government's brief p. 6 and footnote 5, p. 7 and Joint App. p. 91). As previously demonstrated by petitioner, and acknowledged in the panel decision, paragraph 4 of the indictment charged the elements of odometer tampering (see petitioner's brief pp. 29-30 and Joint App. p. 72).

Thus, it is not correct to say, as the government does, that the indictment did not allege that petitioner actually altered the odometers.

The government argues that, since the "statutory elements" test is used to determine if an offense is a "lesser included offense" in double jeopardy cases, the same test should be used in jury instruction decisions. Of course, as the government concedes in footnote 8, page 19 of its brief, the fact that one offense is subsumed in the statutory elements of a greater offense does not prohibit conviction for both offenses, if the legislative intent is to impose double punishment, *Garrett* v. *United States*, 471 U.S 773 (1985).

Thus, the government concedes that the "statutory elements" test is *not* the determining factor in double jeopardy, and there is obviously no reason to make the "statutory elements" test the determining factor in jury instruction cases.

Judge Flaum's dissent expresses petitioner's arguments on this point more aptly than petitioner can:

> The majority also opines that it "seems desirable" that the same test be used for determining whether a lesser offense instruction should be given and for determining whether cumulative punishment and/or

separate trial is permissible on two charged offenses. *Supra* p. 13. I do not see why this identity is required. If a more expansive test is used for instruction purposes, the result will be that in some cases both instructions will be allowed where the two offenses could be punished cumulatively or tried separately, i.e. where they are "separate" offenses under the elements test. I do not foresee any undesirable consequences flowing from this eventuality. If a defendant in such a case is acquitted on both charges he cannot be retried on either, not because of their relationship but because the acquittal itself acts as a bar. The same is true if the defendant is only convicted of the lesser offense; he could not be retried on the greater because his lesser conviction represents an implied acquittal on the greater charge. If he is convicted of the greater offense there is a theoretical possibility that the government could retry him on the lesser charge (because the jury never considered it), but this is highly unlikely. Of course, in a case such as the one I have just described the prosecution presumably would be free to charge both offenses initially and to seek consecutive sentences thereon.

(Joint App. p. 104, footnote 1)

The government also complains about the infringement on its prerogative to determine what charge to bring against petitioner, (see government's brief pp. 26-27). What little point there is to this argument vanishes when you realize that the decision by the Court to charge a lesser offense under the "statutory elements" test also "preempts" the charging decision of the prosecutor and the grand jury. The government can't seriously argue that federal judges will deliberately undermine well-proven cases with frivolous lesser instructions.

Since the government argues for a "statutory elements" test, which precludes considering the facts of a particular case, it is no surprise that in this case the government

doesn't discuss how a weak mail fraud case was bolstered by copious proof of odometer tampering, backed up with the prosecutor's argument that petitioner would escape all punishment if not convicted of mail fraud (see petitioner's brief, p. 28).

The government wishes to exclude from consideration "the inferences that might reasonably be drawn from the evidence at trial," (government's brief p. 25), and focuses instead on the academic points that "A jury instruction on a lesser included offense does not, *in the abstract* (emphasis added) favor either the defendant or the government" (government's brief p. 28) and "It is . . . . by no means clear that, *as a general matter* (emphasis added), the 'inherent relationship' test is more favorable to defendants than the 'elements' test; *a fortiori*, it is unclear that the inherent relationship test is any 'fairer' than the traditional approach" (government's brief p. 29).

This case is not about abstractions. This Honorable Court must rule on what is fair to petitioner, on the facts of this case. The fact is that petitioner's conviction was secured by the kind of appeal to prejudice which this Court recognized as improper in *Keeble* v. *United States*, 412 U.S. 205 (1973).[3]

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[3] The government resorts to the *ad hominem* argument that if petitioner wins his challenge to his mail fraud conviction, he will be gratified that a lesser instruction on odometer tampering was not given. Petitioner has had these felony convictions hanging over his head for 5 years. If it turns out that the convictions were improper, the government should accept the outcome gracefully. After all, the defendant in *United States* v. *Coia*, 755 F.2d 595 (7th Cir. 1985), who was convicted under the "inherent relationship" rule, didn't get released from prison when the Seventh Circuit subsequently changed its mind.

The "inherent relationship" test is the better test because it reaches cases, like the present one, where justice demands some limit on prosecutorial overreaching and overcharging.

IV. CONCLUSION

For the foregoing reasons, petitioner's convictions should be reversed, and a judgment of acquittal entered, or at least a new trial ordered, with directions to instruct the jury on the lesser included offense of odometer tampering.

Respectfully submitted,

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